Supreme Court, U.S.
FILED
AUG 21 1985

No. 85-125

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BOYD WALTON, JR., *et ux, et al.*,
Petitioners,

v.

COLVILLE CONFEDERATED TRIBES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS COLVILLE CONFEDERATED TRIBES IN OPPOSITION

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890
Attorney for Respondents
Colville Confederated Tribes

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether this Court should review this case which arises primarily from the invalid claims by Petitioner Walton to Respondent Colville Confederated Tribe's reserved rights to water which were denied by the court below by reason of the fact that Petitioner Walton claims reserved rights for lands which are "water-saturated or subirrigated" for which an award of water would, declared the court below, amount to a wasteful "double allocation," which issues do not involve either Constitutional or statutory questions presented by Petitioner Walton?

Whether this Court should consider the questions presented by Petitioner Walton due to the fact that the Opinion of the Court of Appeals here for review (*Walton III*) turns markedly upon admitted failure of the district court to comply with the explicit mandate of the Court of Appeals in *Walton II* and does not turn upon the Constitutional questions presented by Petitioner Walton?

ERRONEOUS STATEMENT AS TO PARTIES BEFORE THE NINTH CIRCUIT

Petitioner Walton asserts, in error, that the United States of America and the State of Washington were before the Court of Appeals for the Ninth Circuit in this litigation. The Court of Appeals (a) on May 29, 1984, granted the motion of the United States for a voluntary dismissal;* and (b) by its Order dated October 3, 1984,** declared:

> On appeal after remand, appellants [Colville Confederated Tribes] challenge the State's status as a party to this appeal. . . . the State's . . . interests are insufficient to support the State's continued status as a party to this appeal and thus dismisses the State. . . . [allowing] a brief as an amicus curiae. . . .

---

* Appendix A.

** Appendix B.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
ERRONEOUS STATEMENT AS TO PARTIES BEFORE THE NINTH CIRCUIT	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1, 2
JURISDICTION	2
STATEMENT OF THE CASE	2
Walton I	4
Walton II	5
Walton III	8
Violations of *Walton II* Mandate	8
Rejection of Walton's Claimed Reserved Rights for "water-saturated or subirrigated" Lands	10
Mandate Was Violated by Constricting All of Respondent Tribe's Reserved Rights	11
ARGUMENT	12
Respondent Tribe Questions Transferability	12
Congress Severed Rights to the Use of Water from the Public Lands in Contrast to Reserving Indian Rights for Indians	15
Does "Transferability" Comport with Congressional Will?	16
VIOLATION OF THE PRINCIPLES OF "DUE DILIGENCE" IN WESTERN WATER LAW ERRONEOUS BASIS OF PETITIONER'S CLAIM	18

TABLE OF CONTENTS—Continued

	Page
Intent To Appropriate and Due Diligence Inseparable in Appropriation	18
Petitioner Walton's Failure To Sustain Burden as to Intent and Due Diligence	20
Failure To Perfect Appropriation by Petitioner Walton Is Here Involved—Not "Forfeiture and Divestment"	22
Respondent Tribe's Reserved Rights for Fishery	23
Miscellaneous Misstatements by Petitioner Walton	25
CONCLUSION	27
APPENDIX A, Order dated May 29, 1984	1a
APPENDIX B, Order dated October 3, 1984	2a

TABLE OF AUTHORITIES

Page

Arizona v. California, 373 U.S. 546, 599 (1963) ..5, 14, 15
California-Oregon Power Co. v. Portland Cement Co., 295 U.S. 143, 156 (1935) 16
Colville v. Walton, 460 F. Supp. 1320 (U.S.D.C. E.D. WA. 1978) ..... *passim*
Colville v. Walton, 647 F.2d 42 (CA 9, 1981) ; *cert. den.* 454 U.S. 1092 (1981) ..... *passim*
Colville v. Walton, 752 F.2d (CA 9, 1985) ..... *passim*
Colville v. Walton, 758 F.2d 1324 (CA 9, 1985), (Denying Rehearing and En Banc Suggestion) .. 2
Federal Power Commission v. Oregon, 349 U.S. 435 (1955) 15
Hewitt v. Story, 54 F. 510, 515 (CA 9, 1894) 19
Howell v. Johnson, 89 F. 556, 558 (1898) 16
Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41 (1926) 19
In re Owyhee River, 124 Oregon 44, 259 Pac. 292 (1927) 21
In re Water Rights in Alpowa Creek, State v. Anderson, et al., 129 Wash. 9, 224 Pac. 29, 31 (1924) 19
In re Waters of Doan Creek, State v. McBee, 125 Wash. 14, 215 Pac. 343 (1923) 19
Longmire v. Smith, 26 Wash. 438, 67 Pac. 246 (1901) 19
Ofield v. Ish, 21 Wash. 277, 57 Pac. 809, 810 (1899) 19
Sander, et al., v. Bull, et al., 76 Wash 1, 135 Pac. 489 (1913) 19
Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254, 255 (1894) 19
State ex rel. Ham. . . v. Superior Court of Grant County, 70 Wash. 442, 126 Pac. 945 (1912) 19
Tennessee Valley Authority v. Hill, 437 U.S. 153, 173, 185-187 (1978) 17
United States v. Ahtanum Irrigation District, 236 F.2d 321, 341 (CA 9, 1956) ; *cert. den.* 325 U.S. 988 (1959) 23

TABLE OF AUTHORITIES—Continued

Page

United States v. Ahtanum Irrigation District, 330 F.2d 897, 904 (CA 9, 1965); *cert. den.* 381 U.S. 924 (1965) 23
United States v. City and County of San Francisco, 310 U.S. 16, 19-30 (1939) 17
United States v. Powers, 305 U.S. 527 (1939) 18
United States v. Winans, 198 U.S. 371, 381 (1905) .. 6, 17
United States v. Winters, 207 U.S. 564, 576 (1908) 4, 5, 12, 14, 15, 17, 18, 27
Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 666 (1978) 6
Wilson, et al., v. Omaha Indian Tribe, 442 U.S. 653, 665, *et seq.* (1979) 16

STATUTES

25 U.S.C. 381 ..... 13, 14, 15, 16, 17, 18
25 U.S.C. 348 17
28 U.S.C. 1251(1) 2
28 U.S.C. 1362 4
43 U.S.C. 372 23
Act of July 26, 1866, Ch. 262, Sec. 9 (14 Stat. 251-253) 15, 16

OTHER AUTHORITIES

Clark, *Waters and Water Rights*, Vol. 5, Sec. 408.1, p. 73, *et seq.*; Sec. 410.4, p. 141 ..... 19, 20
Kinney on Irrigation and Water Rights, Vol. II, 2d Ed., Sec. 877, pp. 1547 and 1551 ..... 19, 20
Selected Problems in the Law of Water Rights in the West, Misc. Publication 418, U.S. Dept. of Agriculture, p. 170 [In re Owyhee River] 21
Wiel, *Water Rights in the Western States*, Vol. 1, 3rd Ed., Sec. 478, p. 502; Sec. 480, p. 506 ..... 19, 20
Wiel, *Water Rights in the Western States*, Vol. 1, 3rd Ed., Sec. 383, 413-414 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-125

BOYD WALTON, JR., *et ux, et al.*,
Petitioners,

v.

COLVILLE CONFEDERATED TRIBES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS COLVILLE CONFEDERATED TRIBES IN OPPOSITION

OPINIONS BELOW

Walton I, the initial decision in this case, is reported as *Colville Confederated Tribes, Plaintiff v. Boyd Walton, Jr., et ux, et al., Defendants; State of Washington, Defendant-Intervenor; United States of America, Plaintiff v. William Boyd Walton, et ux, et al., and the State of Washington, Defendant*, 460 F.Supp. 1320 (U.S.D.C. E.D.Wa. October 25, 1978).

Walton II is reported as *Colville Confederated Tribes, Plaintiff-Appellant v. Boyd Walton, Jr., et ux, et al., Defendants-Appellees and State of Washington, Intervening Defendant-Appellee; United States of America, Plaintiff-Appellee v. William Boyd Walton, et ux, Defendants-Appellants, and State of Washington, Defendant-Appellant*, 647 F.2d 42 (CA 9, 1981); *cert. den.*, 454 U.S. 1092 (1981).

Memorandum Decision, August 31, 1983, United States District Court for the Eastern District of Washington, *Colville Confederated Tribes v. Walton*, on remand from *Walton II*; not reported; set forth in Appendix to Petition for Certiorari, 16a.

Walton III reported as *Colville Confederated Tribes, Plaintiffs-Appellants v. Boyd Walton, Jr., et ux, et al., Defendants-Appellees*, 752 F.2d 397 (CA 9, January 21, 1985).

Order Denying Rehearing and En Banc Suggestion, 758 F.2d 1324 (CA 9, April 22, 1985).

JURISDICTION

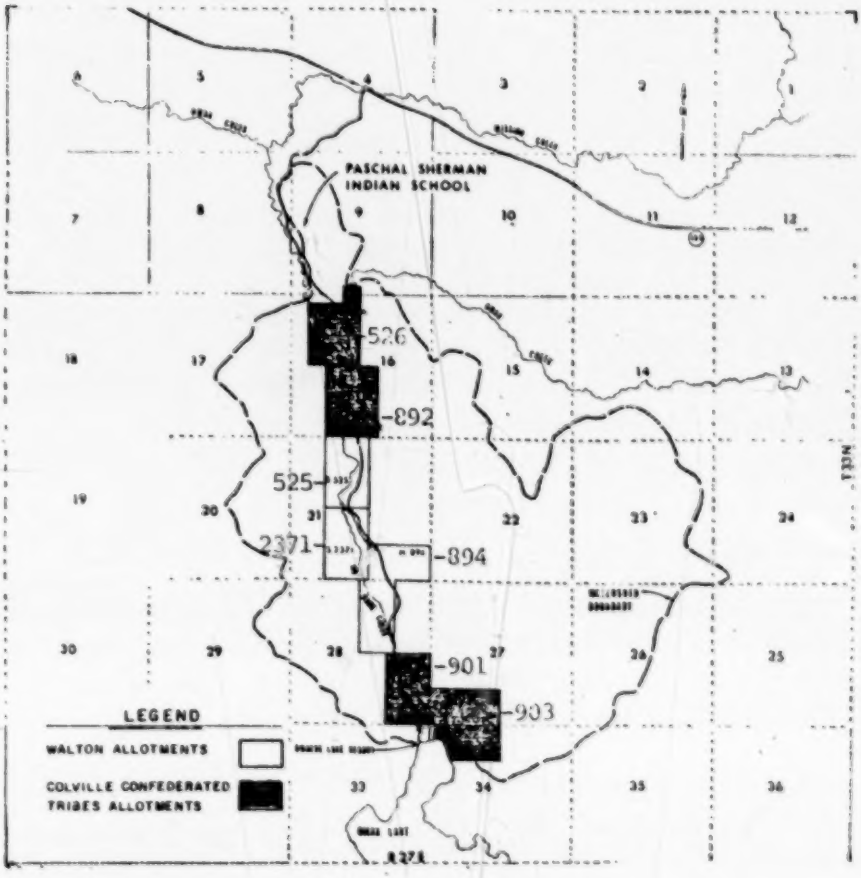
The judgment of the Court of Appeals was entered on January 21, 1985. The Order Denying Rehearing and the En Banc Suggestion was entered April 22, 1985. The Petition for Certiorari was filed July 23, 1985. The jurisdiction of this Court was invoked under 28 U.S.C. 1251(1).

STATEMENT OF THE CASE

Presented here is the continuation of 15 years of contentious litigation between Respondents Colville Confederated Tribes—hereafter referred to as Respondent Tribe—which occupy the Colville Indian Reservation, State of Washington, and non-Indian Petitioners Waltons—hereafter referred to as Petitioner Walton—over reserved rights to the use of water. This is a classic example of the irreconcilable conflict between Indian and non-Indian in which the Indian survival turns upon the concepts applied by the opinion of the Court of Appeals that Petitioner Walton seeks here to have reversed.

Involved are questions of whether Petitioner Walton, who occupies three former Colville allotments, will be permitted totally to monopolize all of the meager supply of water in a non-navigable stream, referred to as No Name Creek. That stream, contrary to Petitioner Wal-

ton's assertion,[1] does *not* arise upon Walton's property but rather ". . . originates on [Colville] Allotment No. 892, north of the Walton property."[2] No Name Creek arises and flows its full length within the Colville Indian Reservation. As can be seen on the Location Map which appears below, No Name Creek arises on Colville Allotment 892 and traverses three former Colville allotments now occupied by non-Indian Walton. After traversing those three allotments, No Name Creek enters



LOCATION MAP

---

[1] Pet.Cert., p. 4.

[2] *Walton I* at p. 1324.

Colville Allotments 901 and 903 and terminates in Omak Lake, a closed, highly saline body of water, which is likewise entirely within the Colville Indian Reservation.

Non-Indian Petitioner Walton illegally seizes and converts to his own use the entire natural flow of No Name Creek and supplemental water pumped into the stream by Respondent Tribe. That illegal seizure gave rise to this protracted litigation.

Walton I [3]

On September 15, 1970, Respondent Tribe initiated this case invoking the jurisdiction of the United States District Court for the Eastern District of Washington pursuant to 28 U.S.C. 1362.[4] By that action, Respondent Tribe seeks:

(1) to preserve and protect its invaluable reserved rights to the use of water in No Name Creek, and

(2) to have judicially declared that, pursuant to this Court's decisions, Tribe is entitled to reserved rights without which it cannot survive on its semi-arid Reservation.

After a comprehensive trial on the merits, the court below entered its October 25, 1978 Memorandum Opinion, referred to throughout as *Walton I*, in which it:

(a) sustained the Tribe's claim to *Winters* reserved rights to the use of water in No Name Creek with a priority of at least July 2, 1872, the date when the Colville Indian Reservation was created; [5]

---

[3] *Colville v. Walton*, 460 F. Supp. 1320 (U.S.D.C.E.D.Wa. 1978).

[4] 1362.Indian tribes. The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Added Pub.L. 89-635, 1, Oct. 10, 1966, 80 Stat. 880.)

[5] *Walton I*, p. 1324-1326.

(b) denied Petitioner's contention that the Tribe's *Winters* reserved rights could be transferred to Petitioner Walton; [6]

(c) declared—factually in error—that Petitioner Walton was entitled to rights to 32 acres of land irrigated by the first purchaser from the Colville allottee,[7] contradicting the District Court's earlier and correct finding that: "The former Indian allottees had not irrigated these lands." [8] and

(d) affirmed the Certificate of Water rights issued in *1950* by the State of Washington to Petitioner Walton, declaring, nevertheless, that the Tribe's *Winters* reserved rights were prior and paramount to Petitioner Walton's rights claimed pursuant to state law.[9]

Walton II [10]

From *Walton I*, as declared by the Court of Appeals in *Walton II*, "Walton, the Tribes, and the State [of Washington] appeal parts of the decision." [11]

The Court of Appeals in *Walton II*:

(a) affirmed and applied the concepts of *Walton I* respecting this Court's *Winters Doctrine* [12] reserved rights and the method pursuant to which the *Winters* reserved rights for agriculture were to be measured; [13]

---

[6] *Ibid.*, p. 1326.

[7] *Ibid., p.* 1329.

[8] *Ibid.*, p. 1324, which establishes the error as to the 32 acres. Note: see, *infra.*, at p. 6.

[9] *Ibid.*, p. 1324, which establishes the error as to the 32 acres. Note: see, *infra.*, at p. 6.

[10] *Colville v. Walton*, 647 F.2d 42 (CA 9, 1981); *cert. den.* 454 U.S. 1092 (1981).

[11] *Ibid.*, p. 46; Pet.Cert.App., p. 41a. As noted there, the United States "dropped its appeal," ftn. 6.

[12] *United States v. Winters*, 207 U.S. 564, 576 (1908).

[13] *Arizona v. California*, 373 U.S. 546, 599 (1963).

(b) likewise affirmed the holding of *Walton I* respecting the "Colville reserved rights" for a replacement fishery, citing the Court's *Winans* Decision [14] and its more recent decision of *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*,[15] explicitly declaring, nevertheless, that *Walton I* was in error in failing finally to adjudicate to Respondent Tribe a reserved right ". . . of water from No Name Creek for the development and maintenance of replacement fishing grounds." [16]

(c) declared that No Name Creek rises and flows its full length within the Colville Indian Reservation; has a ". . . direct effect on the health and welfare of the tribe"; ". . . water on the reservation is critical to the lifestyle of its residents and the development of its resources"; and that, under the circumstances, "We hold that state regulation of water in the No Name system was preempted by the creation of the Colville Reservation." [17] Predicated upon that factual recitation, the Court in *Walton II* further declared: ". . . water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority";[18]

(d) declared, contrary to *Walton I*, that ". . . we conclude . . . an Indian allottee may sell his right to reserved water";[19] and

(e) further declared, in explicit terms, that the "non-Indian purchaser" acquires a reserved right to the extent that the "Indian allottee at the time title passes" was using water and, in addition, the first "non-Indian suc-

---

[14] *United States v. Winans*, 198 U.S. 371, 381 (1905).

[15] 443 U.S. 658, 666 (1978).

[16] *Walton II*, p. 48; Pet.Cert.App., p. 45a.

[17] *Ibid.*, p. 52; Pet.Cert.App., p. 53a-57a.

[18] *Ibid.*

[19] *Ibid.*, p. 50; Pet.Cert.App., p. 50a.

cessor" acquires a right "to water" that is appropriated "with reasonable diligence after the passage of title," providing that the non-Indian successor must continuously use the acquired right or lose it through non-use.[20]

On August 18, 1981, Respondent Tribe filed its Petition for a Writ of Certiorari in this Court to review *Walton II*. On November 30, 1981, the petition was denied.

Thereafter on May 5, 1982, Respondent Tribe and Petitioner Walton proceeded to trial on the merits in conformity with the mandate of *Walton II*.

On August 31, 1983, the district court, after that trial on the merits, entered its unreported Memorandum Decision.[21] In that Memorandum Decision, the district court markedly violated the mandate contained in *Walton II*, declaring, in substance, that Respondent Tribe and Petitioner Walton had "equal" priorities for agriculture.[22] The district court, moreover, violated the mandate in *Walton II* respecting Respondent Tribe's right of fishery,[23] irrespective of the fact that the district court made this finding:

> "Dr. Koch's [Respondent Tribe's witness] testimony as to hatchery needs was uncontroverted. Based on his experience over the preceding six years. . . .

Dr. Koch declared that the Tribe's reserved water requirements totaled 350 acre feet annually. Further, respecting Dr. Koch's testimony, the district court declared:

> There being no other evidence in the record on this area, and no reason to question Dr. Koch's credibility, those figures will be accepted.[24]

---

[20] *Ibid.*, p. 51; Pet.Cert.App., p. 52a.

[21] Pet.Cert.App., p. 16a.

[22] *Ibid.*, p. 26a.

[23] *Ibid.*, pp. 27a-28a.

[24] *Ibid.*, p. 29a.

In rejecting the mandate of *Walton II*, respecting Respondent Tribe's fishery, the district court declared that there would be available 187.2 acre feet annually for "other uses" in addition to the agricultural right.[25]

From the district court's Memorandum Opinion, Respondent Tribe sought review in the Court of Appeals.

Walton III[26]

Violations of *Walton II* Mandate

Violation of the mandate in *Walton II* is the hallmark of the district court's August 31, 1983 Memorandum Decision. *Walton III* turns markedly upon the district court's violation of the mandate in *Walton II* and, respecting those drastic departures by the district court, the Court of Appeals in *Walton III* said this:

> On remand the district court '[was] without power to do anything . . . contrary to either the letter or spirit of the mandate *construed in the light of the opinion of this court deciding the case.*'[27]

adding, under the heading "Scope of the Mandate," that the district court ". . . on remand was to 'calculate the respective rights of the parties,' " stressing in that connection that the district court was required to consider:

> . . . *the diligence with which the immediate grantee from the Indian allottees appropriated water, and the extent to which successor grantees, up to and including Walton, continued to use the water thus appropriated.*[28]

Walton III declared that, absent limiting Petitioner Walton's share by the "diligence" of the "immediate

---

[25] *Ibid.*

[26] *Colville v. Walton*, 752 F.2d 397 (CA 9, 1985); *Colville v. Walton*, Order Denying Rehearing, 758 F.2d 1324 (CA 9, 1985).

[27] *Walton III*, p. 401; Pet.Cert.App., p. 5a. (Court's emphasis)

[28] *Walton III*, p. 402; Pet.Cert.App., pp. 7a-8a. (Emphasis supplied)

grantee" from the Colville allottee would permit ". . . any remote purchaser [to] . . . appropriate enough water to irrigate all irrigable acreage"—precisely the course adopted, in total error, by the district court. That erroneous course of conduct by the district court, declares *Walton III*, renders "meaningless" the "reasonable diligence requirement" of *Walton II*.[29]

In establishing the "reasonable diligence requirement," the court in *Walton III* "borrowed" from state law concepts giving rise to the "doctrine of 'prior appropriation' " which the court observed is adhered to by most Western States, including the State of Washington wherein this controversy arises. Having reviewed the basics of the "Doctrine of prior appropriation," the court in *Walton III* states: "To perfect an 'appropriation,' one must intend to appropriate a quantity of water, and diligently put it to a beneficial use." [30]

As implicitly stated by the court in *Walton III*, *sine qua non* is an "intent" to effectuate an appropriation. It likewise declared that ". . . intent and due diligence are necessarily interrelated." [31] On that background, the court in *Walton III* rejected the district court's findings in its Memorandum Decision of August 31, 1983, that Petitioner Walton ". . . exercised 'diligence' in beneficially applying water . . . given prevailing economic and technological conditions." [32] In totally rejecting that finding, the court in *Walton III* declared that:

> *We find this conclusion unsupported by the record.*
>
> The amount of land irrigated remained fairly constant throughout the 23-27 year period following

---

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*, at p. 402; Pet.Cert.App., p. 9a.

[32] Pet.Cert.App., p. 24a.

purchase by the Whams, the first non-Indian purchasers.[33]

Walton III further declared:

> We affirm the trial court's finding that sufficient water to irrigate 30 acres was appropriated with reasonable diligence by the original non-Indian purchasers [the Whams] and continually used by each subsequent owner, including Walton.[34]

Rejection of Walton's Claimed Reserved Rights for "water-saturated or subirrigated" Lands

In *Walton III* reference is made to the Court of Appeals' rejection of the argument that ". . . each preceding owner has farmed the water-saturated or subirrigated portion of his allotments. . . ." This, Petitioner Walton urges demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating the "water-saturated or subirrigated" portions of Walton's allotments. In rejecting Petitioner Walton's claim to rights for "water-saturated" lands in excess of 30 acres, the Court in Walton III said:

> *We find his [Petitioner Walton's] argument unpersuasive. The record indicates that this same acreage [above 30 acres] is subirrigated today.*[35]

The Court in *Walton III*, "proceeding *arguendo*," rejected the claim of Petitioner Walton to reserved water for "water-saturated or subirrigated" lands by stating:

> *. . . the subirrigated acreage . . . is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.*[36]

---

[33] *Walton III.*, p. 403; Pet.Cert.App., 9a. (Emphasis supplied)

[34] *Ibid.*, Pet.Cert.App., 11a.

[35] *Walton III*, p. 403; Pet.Cert.App., p. 10a. (Emphasis supplied)

[36] *Ibid.* (Emphasis supplied)

In explicitly rejecting the concepts in the district court's August 31, 1983 Memorandum Decision purporting to constrict Respondent Tribe's right to 107.2 acres as distinguished from Respondent Tribe's 166.6 irrigable acres, the Court of Appeals in *Walton III* stressed that:

> Reducing the Indian allottees' share for non-use is in direct conflict with [the mandate in] *Walton II*. . . . The Court should have allocated the full 666.4 acre feet per year to the Indian allottees.[37]

Walton III applied the explicit language set forth above that the district court was required to comply with "the letter or spirit of the mandate construed in the light of the opinion of this court." [38]

Mandate Was Violated by Constricting All of Respondent Tribe's Reserved Rights

Walton III reiterated the mandatory aspects of *Walton II* and declared that:

> *Walton II* is clear. The Tribe has a reserved right 'to sufficient water to permit natural spawning of the trout.' . . . and the Indian allottees have right to share in the reserved water, based on the irrigable acreage owned, without any reduction for non-use."[39]

Proceeding on the basis of a water duty of 4 acre feet a year, the Court of Appeals in *Walton III* declared:

> On remand, the district court will allocate the reserved water among the parties, in accord with our opinion: 120 acre feet per year to Walton; 666.4 to the Indian allottees. . . ." [40]

---

[37] *Ibid.*, p. 404; Pet.Cert.App. 12a.

[38] *Supra.*, p. 8.

[39] *Walton III*, p. 404; Pet.Cert.App., p. 13a.

[40] *Ibid.*, at 405 and 15a.

Provision is likewise made in *Walton III* that on remand the district court "will allocate reserved water" totaling "350 [acre feet] to the Tribe's fishery." [41]

By that award of 120 acre feet of water annually to Petitioner Walton, the Court of Appeals in *Walton II* assured Petitioner a water supply for his 30 acres—the only lands of Petitioner Walton requiring the application of water. As stressed by the Court of Appeals in *Walton III*, and extensively reviewed above—as fully proved by Respondent Tribe—the balance of Petitioner Walton's land which is "subirrigated today . . . is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation"—decreeing to Petitioner Walton the right to waste water.[42]

ARGUMENT

Respondent Tribe Questions Transferability

It is with reluctance that Respondent Colville Confederated Tribe accepts the concept of "transferability" of its *Winters* reserved rights to non-Indian Walton, as enunciated in *Walton II* and applied in *Walton III*. The concepts of "transferability" were steadfastly opposed by Respondent Tribe in the District Court, the Court of Appeals, and here.[43] Nevertheless, to conclude 15 years of costly, time-consuming, and contentious litigation, Respondent Tribe seeks to end this litigation and to adjust to the concepts of "transferability" of Colville reserved rights to non-Indians if there can be strict adherence to the criteria respecting "transferability" established in *Walton II*, as construed and applied in *Walton III*.

---

[41] *Ibid.*

[42] *Supra.*, at p.

[43] *Petition for Certiorari* on *Walton II*, denied; *supra.*, p. 8.

Sound argument opposing "transferability" of Indian reserved rights to the use of water, predicated upon the applicable Congressional enactments, impels a conclusion contrary to "transferability." In that regard reference is made to 25 U.S.C. 381 touched most lightly by Petitioner Walton in support of his request for review.[44] That slight reference to the only provision of the General Allotment Act which relates to the rights to the use of water is understandable. As pointed out in *Walton II*, the lands now occupied by Petitioner Walton ". . . are part of the reservation." The Court of Appeals then added that "The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. § 381."[45]

The explicit language of 25 U.S.C. 381 rejects wholly the concepts of transferability. There it is declared that where, as on the Colville Indian Reservation, ". . . water for irrigation is necessary . . . for agricultural purposes, the Secretary of the Interior is authorized to prescribe . . ." rules and regulations ". . . necessary to secure a just and equal distribution. . . ." of water ". . . *among the Indians residing upon any such reservation. . . .*"

Confronted with that language, Petitioner Walton presents this remarkable argument that 25 U.S.C. 381 enables the Secretary of the Interior ". . . to enforce a just and equal distribution of water among Indian allottees. . . ."[46] That statement is incorrect. The explicit language respecting a just and equal distribution of water in short supply is ". . . among the *Indians* residing upon" the reservation—not only allottees. It is manifest, as on the Colville Reservation, that the water requirements of "the Indians residing" on the reservation are not constricted to the allottees.

---

[44] Pet.Cert.App., p. 3, 16.

[45] *Walton II*, p. 53, ftn. 17; Pet.Cert.App., p. 56a.

[46] Pet.Cert.App., pp. 15-17.

Ignored likewise by Petitioner Walton is the fact that 25 U.S.C. 381 provides that ". . . no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor," other than the "just and equal distribution of water among the Indians residing upon" the Colville Indian Reservation. It is clearly improper for Petitioner Walton to state that the prohibition against any acquisition of rights to the use of water other than the just and equal distribution is limited to "riparian owners." Rather, the Act *proscribes* "appropriation or grant of water *to the damage of any other* riparian proprietor." Quite obviously Congress, in explicit language, declared and determined that a supply of water would always be maintained for a just and equal distribution "among the Indians residing" on the reservation. There is a single, reasonable conclusion from both the rational and the explicit langauge of 25 U.S.C. 381 and that is it was the intention of Congress to prohibit the non-Indian purchaser, for example, Petitioner Walton, from interfering with the absolutely essential supply of water for the Indians remaining on the reservation. As this Court fully recognized in both *Winters*[47] and *Arizona v. California*,[48] and stressed in *Walton I* and *Walton II*:

> Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. . . . We hold that water was reserved when the Colville Reservation was created.[49]

An objective of establishing the Colville Indian Reservation was to provide ". . . a homeland for the Indians to maintain their agrarian society . . . that water was reserved to meet future as well as present needs," and, quoting from *Arizona v. California*, concluded ". . . 'that

---

[47] *Winters v. United States*, 207 U.S. 564, 576 (1908).

[48] *Arizona v. California*, 373 U.S. 546, 599-601 (1963).

[49] *Walton II*, p. 47; Pet.Cert.App., p. 42a.

the only feasible and fair way by which reserved water for a reservation can be measured is irrigable acreage.' " [50]

Congress Severed Rights to the Use of Water from the Public Lands in Contrast to Reserving Indian Rights for Indians

The language of 25 U.S.C. 381 comports fully with the explicit language of this Court in *Winters* and *Arizona v. California* and the Court of Appeals in *Walton II*. There is no merit to Petitioner Walton's contention that Congress could have intended to render useless the lands of the Colville Indians residing on the reservation by permitting Petitioner Walton and other non-Indians to seize and monopolize the waters on the Colville Indian Reservation, as has been done by Petitioner Walton on No Name Creek.

Reference is made by Petitioner Walton that the General Allotment Act ". . . was passed 20 years before this Court in *Winters v. United States* . . . affirmed the existence . . ." of Indian rights.[51] That argument ignores the historic facts that Congress, as early as 1866,[52] was fully aware of the imperative need for water in Western United States as that Act and related Acts were construed by the Court in *Federal Power Commission v. Oregon Decision.*[53] Ignored likewise by Petitioner Walton is the fact that in 1877 the Congress of the United States severed all of the remaining rights to the use of water from the public lands—not the reserved lands, which include Indian lands—with the objective of permitting appropriation of rights to the use of water to render habitable the arid and semi-arid lands in Western United

---

[50] *Ibid.*, at p. 48 and p. 44a.

[51] Pet.Cert.App., pp. 15, 16.

[52] Act of July 26, 1866, Ch. 262, Sec. 9 (14 Stat. 251-253).

[53] *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

States, as fully analyzed by the Court in *California-Oregon Power Commission v. Portland Cement Co.*[54]

The intentional severance of the rights to the use of water from the public lands by the Congress in 1877, 10 years antecedent to the enactment of the General Allotment Act and 25 U.S.C. 381, underscores the fact that Congress explicitly intended to *retain* the available water on the Indian reservations for the "Indians residing" on those reservations and *not* to authorize the transfer of those rights to the use of water to non-Indians in the status of Petitioner Walton.

Does "Transferability" Comport with Congressional Will?

In *Walton III* the Court of Appeals failed to apply the controlling principles of Congressional enactments pertaining to Indian rights and Indian people which require the most favorable interpretation on behalf of the Indians. Most assuredly the "most favorable" interpretation for the Indians of 25 U.S.C. 381 was clearly rejected in *Walton III*.[55] Moreover it is too clear for serious chal-

---

[54] 295 U.S. 143, 162 (1935): "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced."

[55] *Wilson, et al., v. Omaha Indian Tribe*, 442 U.S. 653, 665, *et seq.*, (1979): ". . . 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' "

lenge that Congress alone has the power to control the disposition of the reserved rights to the use of water and that it intended to reserve those rights for the Indians is the only proper conclusion from the language of 25 U.S.C. 381. This Court has specifically condemned judicial legislation.[56]

Equally lacking in merit is Petitioner Walton's contention that 25 U.S.C. 348 of the General Allotment Act abrogated 25 U.S.C. 381 by providing that a patent to non-Indians conveyed the land and all reserved rights ". . . free from all charge or encumbrance whatsoever. . . ."[57] That contention is frivolous. It is elemental that 25 U.S.C. 348 and 25 U.S.C. 381, being part of the General Allotment Act, must be read in *pari materai.* This Court, in its *Winans Decision,*[58] rejects out of hand a comparable assertion respecting reserved rights of fishing, declaring that:

> . . . the [reserved] right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

adding that:

> The land department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land. . . .[59]

which laws of the land necessarily include 25 U.S.C. 381.

Manifestly any patent that was issued to an allotment was subject to the "just and equal distribution" clause

---

[56] *See, Tennessee Valley Authority v. Hill,* 437 U.S. 153, 173, 185-187 (1978); *United States v. City and County of San Francisco,* 310 U.S. 16, 19-30 (1939).

[57] Pet.Cert.App., p. 2-3, pp. 17 *et seq.*

[58] *United States v. Winans,* 198 U.S. 371, 381 (1905).

[59] *Ibid.*

of 25 U.S.C. 381. As this Court has declared, arid lands without water are "valueless." [60]

None of the cases cited by Petitioner Walton would vitiate the reserved rights doctrine, as petitioned for here by Petitioner Walton.

VIOLATION OF THE PRINCIPLES OF "DUE DILIGENCE" IN WESTERN WATER LAW ERRONEOUS BASIS OF PETITIONER'S CLAIM

Intent To Appropriate and Due Diligence Inseparable in Appropriation

In explicit detail in *Walton II* the court below reviewed the predicate for its determination that the Colville allottee could transfer his share of the limited water supply when he sold his allotment. That determination was based upon the mistaken concepts that Congress gave no ". . . consideration to the transferability of reserved rights"—ignoring 25 U.S.C. 381.[61] *Walton II*, on the basis of *dicta* from the *Powers Decision*,[62] concluded that the allottee was owner of an appurtenant reserved right to the use of water and that to deny the allottee the right to transfer any of his share of the reserved rights would constitute ". . . a diminution of Indian rights" but diminution could be accomplished, said the court in *Walton II*, only by ". . . express legislation or a clear inference of Congressional intent. . . ." [63]

Predicated upon those misconcepts, it is declared that the Colville allottee could, under the conditions set forth in *Walton II*, transfer his reserved rights. Those conditions of "transferability" were explicitly set forth and guidelines established strictly to measure the rights sub-

---

[60] *Winters v. United States*, 207 U.S. 564, 576, *et seq.* (1908).

[61] *Walton II*, p. 49; Pet.Cert.App., p. 48a-49a.

[62] *United States v. Powers*, 305 U.S. 527 (1939).

[63] *Walton II*, p. 50; Pet.Cert.App., p. 50a.

ject to transfer. It was likewise concluded in *Walton II* that water over and above that being used by the allottee could be appropriated by the first "non-Indian successor" if appropriated "with reasonable diligence after the passage of title." [64]

In applying the concepts of "due diligence," the Court of Appeals in *Walton II* applied the principles governing the acquisition of rights to the use of water *outside* of Indian reservations to which it had historically adhered [65] and which principles are likewise adhered to by the Supreme Court of the State of Washington.

The laws of the State of Washington have no application here, yet the Supreme Court of that State has defined with specificity the critical elements of an appropriation. They are: (1) an intention to appropriate; (2) for a beneficial use; (3) for a stated quantity of water; and (4) by an effectuation of the intention with reasonable diligence.[66] *Wiel*, *Kinney*, and *Clark* in their

---

[64] *Walton II*, p. 51; Pet.Cert.App., pp. 51a, 52a.

[65] *Hewitt v. Story, et al.*, 54 F. 510, 515 (CA 9, 1894).

[66] *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, 255 (1894), the Court stressed that "where water is an important feature in the success of farming operations . . . ." it is inexcusable to divert and waste water required by others; *Offield v. Ish, et al.*, 21 Wash. 277, 57 Pac. 809, 810 (1899); *Longmire v. Smith, et al.*, 26 Wash. 438, 67 Pac. 246 (1901); *State ex rel. Ham. . . v. Superior Court of Grant County*, 70 Wash. 442, 126 Pac. 945 (1912), reviewing the need for an expression of intention as to uses for which water is to be applied; *Sander et al., v. Bull, et al.*, 76 Wash. 1, 135 Pac. 489 (1913), requisites as to elements of appropriation and as to dates and quantities of acres irrigated; *In re Waters of Doan Creek, State v. McBee*, 125 Wash. 14, 215 Pac. 343 (1923), need for "intention" for bona fide appropriation; *In re Water Rights in Alpowa Creek, State v. Anderson, et al.*, 129 Wash. 9; 224 Pac. 29, 31 (1924), "An appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use"; *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 Pac. 41 (1926).

authoritative works review the imperative necessity of proof of those critical aspects of an appropriation.[67] Petitioner Walton totally failed to prove an appropriation within the criteria established.

Predicated upon those precedents of "due diligence," the Court in *Walton II* remanded that question to the District Court.

Petitioner Walton's Failure to Sustain Burden as to Intent and Due Diligence

Failure of Petitioner Walton to sustain Petitioner's burden as to "intent" to appropriate rights to the use of water for land in excess of the 30 acres irrigated by the Wham family for a period of "23-27 years" precluded Petitioner Walton from claiming rights for more than 30 acres of land. *Walton III* declared that *Walton II* mandated that water could only be appropriated ". . . with reasonable diligence after the passage of title." [68] *Walton III*, moreover, rejected the district court's ruling that the successors in interest of the Wham family had ". . . exercised 'diligence in applying water . . . given prevailing economic and technological conditions' . . . ." [69] That rejection by the Court of Appeals in *Walton III* was succinctly stated as follows: "We find this conclusion unsupported by the record." [70]

Petitioner Walton fails totally to cite a single authority to support his argument to this Court. Petitioner

---

[67] Wiel, *Water Rights in the Western States*, Vol. I, 3rd Ed., Sec. 478, at p. 502, An appropriation can be effectuated only to the extent of "the amount . . . actually used"; and at Sec. 480 p. 506, the "needs of the appropriator . . . determine the limit of the appropriator's rights." *Kinney on Irrigation and Water Rights*, Vol. II, 2d Ed., Sec. 877, p. 1547 and 1551. Clark, *Waters and Water Rights*, Vol. 5, Sec. 408.1, p. 73, *et seq.*, Sec. 410.4, p. 141.

[68] *Walton II*, p. 51; Pet.Cert.App., p. 52a.

[69] *Supra.*, at p. 9.

[70] *Ibid.*

Walton, in his statement of the case, cites two wholly irrelevant decisions rendered by the Supreme Court of the State of Oregon, neither of which are remotely related to the issues presented here.[71] Relative to the *Owyhee*[72] case, cited by Petitioner Walton, this statement is made:

> An Oregon decision, citing the foregoing case, held that while an appropriation of water may be made to propel a water wheel for lifting water from a stream for irrigation, the appropriation of the current necessaritly must be reasonable; and that under the circumstances of that particular case, it would be unreasonable to permit a water user to hold five or six times the quantity of his appropriation claimed for irrigation simply to operate a water wheel.[73]

In view of the reliance by Petitioner Walton upon decisions from the State of Oregon, *Weil*, under the heading "What Constitutes Diligence," declares that: "In California, Nevada and Oregon, lack of funds will not excuse delay,"[74] underscoring the importance of proceeding diligently, predicated upon a formulated "intent" to appropriate rights to the use of water. As stressed in *Walton III*, there was absolutely no "intent" for a protracted period of time by the Whams, the first non-Indian successors, to divert and use water for more than 30 acres. Moreover, there could be no "intent" by the Wham family to appropriate water for lands which were then and are today "water-saturated or subirrigated."

---

[71] Pet.Cert., p. 13.

[72] *Ibid.*

[73] *Selected Problems in the Law of Water Rights in the West*, Miscellaneous Publication 418, U.S. Department of Agriculture, p. 170. [*In re Owyhee River*, 124 Oregon 44, 259 Pac. 292 (1927)].

[74] Vol. I, *Wiel, Water Rights in the Western States*, 3rd ed., Sec. 383, 413-414.

It is relevant here that even the district court noted that the Wham family:

> . . . were not piggish about taking only their fair share of the natural flow of No Name Creek [for a period of 23-27 years], always allowing a sufficient amount to flow to the south for the benefit of their [Colville Indian] neighbors on 901 and 903.[75]

It is manifest that this litigation stems directly from the fact that Petitioner Walton, contrary to the explicit law applied in *Walton III*, has undertaken to monopolize *all* of the waters of No Name Creek with disastrous consequences to Respondent Tribe and its members.

Failure to Perfect Appropriation by Petitioner Walton Is Here Involved—Not "Forfeiture and Divestment"

The violation by the district court of the mandate in *Walton II*, all as reviewed above, can scarcely be a justification for Petitioner Walton's charge that in some manner the alleged vested fee of the allottees ". . . were not subject to divestment upon a reversion, right of reentry, or forfeiture because of non-use. . . ." [76]

Fallacious reasoning by Petitioner Walton defeats the predicate for Petitioner's claim. Throughout it is asserted that in some manner *Walton II* and *Walton III* divest or cause to be forfeited rights to the use of water claimed by Petitioner Walton. In connection with that assertion, reference is made by Petitioner to the observation in *Walton III* that a claimant to water must "use-it-or-lose-it." [77] Forfeiture or divestiture were not involved. There was a total failure by Petitioner Walton to offer evidence to support a claim for water beyond the 30 acres. A large portion of *Walton III* is devoted to the fact that substantial portions of Petitioner Wal-

---

[75] Pet.Cert.App., p. 19a.

[76] Pet.Cert., p. 18.

[77] *Ibid.*, at p. 19.

ton's lands are "water-saturated or subirrigated" with the water requirement "being satisfied by the present subirrigation." [78] It is a controlling predicate of Western Water Law that "beneficial use" is ". . . the basis, the measure, and the limit of the right" [79] to the use of water. As stressed by the Court of Appeals for the Ninth Circuit, ". . . it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs." [80] In a subsequent *Ahtanum Decision* that basic proposition is reiterated:

> It is plain that under Washington law. . . . *To perfect an appropriation* under the rules applicable in most western states, including the State of Washington, *the user must apply the water to a beneficial use with intent to appropriate.*[81]

It was Petitioner Walton's failure to sustain his own burden of proof respecting the appropriation of water beyond the 30 acres—not divestiture or forfeiture of vested rights, as presented to this Court.

Respondent Tribe's Reserved Rights for Fishery

Walton III succinctly summarized Respondent Tribe's rights of fishery, to which Petitioner Walton did not and cannot respond:

> The [district] court accepted the figures presented by Dr. Koch . . . [*see supra.*, at p. 7] which translated into 350 acre feet per year for the needs of the Tribal Fishery. . . . However, the court al-

---

[78] *Walton III*, p. 403; Pet.Cert.App., p. 10a.

[79] 43 U.S.C. 372.

[80] *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 341 (CA 9, 1956); *cert.den.* 325 U.S. 988 (1957).

[81] *United States v. Ahtanum Irrigation District*, 330 F.2d 897, 904 (CA 9, 1965); *cert.den.* 381 U.S. 924 (1965). (Emphasis supplied)

> located only 187.2 acre feet per year to the fishery [and all other uses] . . . .
>
> *Walton II* is clear. The Tribe has a reserved right 'to sufficient water to permit natural spawning. . . .'
>
> The District Court was obligated to carry out the mandate of *Walton II*. . . . (mandate controlling as to all matters within its compass). . . .
>
> The Tribe is entitled to its full allocation, 350 acre feet per year.[82]

It is undisputed and indisputable that Respondent Tribe had actually appropriated and beneficially used 350 acre feet of water annually for a period of six years. As reviewed above, the Court of Appeals in *Walton* III recognized that appropriation of 350 acre feet and confirmed the right of fishery in Respondent Tribe.

It is likewise an indisputable fact that *Walton III*, as reviewed above, details the intentional violation by the district court of the mandate in *Walton II*, both as to the "due diligence" requirements imposed upon Petitioner Walton and likewise the explicit direction to adjudicate and determine the quantities of water to which Respondent Tribe is legally entitled for its fishery. On that background it partakes of the frivolous for Petitioner Walton to represent to this Court that "On remand the District Judge followed the Ninth Circuit's instructions precisely and with great care." [83]

Under the circumstances, it is too clear for question that review by the Court of the failure of the district court to comply with the mandate of *Walton II* is scarcely warranted.

In the paragraphs which follow, additional confusing aspects of Walton's Petition for Writ of Certiorari will be briefly summarized.

---

[82] *Walton III*, pp. 404-405; Pet.Cert.App., pp. 12a-15a, "V. Omak Lake Fishery."

[83] Pet. Cert., p. 11.

Miscellaneous Misstatements by Petitioner Walton

Basic misstatements pervade all aspects of Petitioner Walton's "Statement of the Case." As stressed above, No Name Creek does not arise on Walton property, as falsely asserted.[84] It is likewise stated that only 107.2 acres of land are being irrigated by the Tribe out of 166.6 acres of land to which rights were adjudicated in *Walton I* for Colville Allotments 892, 901, and 903. Reason for Respondent Tribe's irrigating only 107.2 acres out of 166.6 acres stems from the ongoing, unconscionable violation of Respondent Tribe's rights by Petitioner Walton. By limiting Petitioner Walton to 30 acres of land—and enforcing that limitation in accordance with *Walton III*, Respondent Tribe should now be able to irrigate all of its lands to which rights have been finally adjudicated.

It is an unfortunate misrepresentation for Petitioner Walton to misstate to this Court that "The northernmost Indian allotment . . . can be irrigated from Omak Creek. . . ." [85] The northernmost Allotment No. 526 is *not* included in the 166.6 acres of land for which rights were finally adjudicated. Reference in that connection is made to the map on p. 3 above. To suggest that Allotment 892 can be irrigated from Omak Creek is an intentional misrepresentation. Not only is Allotment 892 far removed from Omak Creek, Omak Creek is already grossly overappropriated.

It is likewise irresponsibly stated that "Omak Creek . . . is not connected with the No Name Creek hydrological system." [86] That is totally incorrect. As can be observed from the map, Omak Creek flows across the No Name Creek Ground Water Basin and contributes

---

[84] *Supra.*, at p. 3.

[85] Pet.Cert., p. 4.

[86] *Ibid.*

substantially to that Basin by deep percolation—an issue scarcely appropriate for this Court's consideration.

In an irresponsible and random fashion, it is believed inexcusably, Petitioner Walton has scattered references to acres, acre feet, sources of water, calculations, speculations, conjectures, and unsupported conclusions, many of which are contradictory and all of which are without sound documentation. For example, reference is made on page 5 of the Petition to 1346.4 acre feet, allegedly the quantity of water needed. However, on page 14 reference is made to a total claim of 1336.4 acre feet. It is unclear where those two figures came from since Petitioners figures of 120, plus 666.4 plus 350 actually add up to 1136.4 acre feet. On page 6 reference is made to 237.6 acre feet of water that is "not now used"—a total fiction—but on page 14 that figure is given as 137.2—presumably to establish an incredible posture that, in a stream that is grossly overappropriated, there is water available but "not used."

Petitioner Walton's contradictions cannot all be reviewed, nor is it necessary since the Court of Appeals in *Walton III* has clearly stated:

> On remand, the district court will allocate the reserved water among the parties, in accord with our opinion: 120 acre feet per year to Walton; 666.4 to the Indian allottees, and 350 to the Tribe's fishery. Since all parties have a priority date as of the creation of the Reservation, each should bear a proportionate share of any adjustment required by shortages of water.[87]

Enforcement on remand of that judgment explicitly directed by *Walton III* would end this controversy. Petitioner Walton would receive all of the water concerning which he offered proof, giving rise to *Walton III*.

---

[87] *Walton III*, p. 405; Pet.Cert.App. 15a.

CONCLUSION

After 15 years of litigation, although Respondent Tribe denies that non-Indian Walton is entitled to any Indian *Winters Doctrine* reserved rights, Respondent Tribe accepts the ruling of *Walton III*, albeit with reluctance.

Accordingly, Respondent Colville Confederated Tribes respectfully urge this Court to end this conflict by denying Petitioner Walton's Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890
Attorney for Respondents
Colville Confederated Tribes

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3504

DC# CV 3831 RJM
Eastern Washington
(Spokane)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM BOYD WALTON, *et al.*,
Defendants-Appellees.

[Filed May 29, 1984]

ORDER

Appellant's motion for voluntary dismissal of appeal No. 84-3504 is granted.

A certified copy of this order sent to the district court shall act as and for the mandate for this court.

For the Court:

/s/ Susan M. Johnson
SUSAN M. JOHNSON
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-4285

DC# CV-3421 RJM
DC# CV-3831 RJM
Eastern Washington
(Spokane)

COLVILLE CONFEDERATED TRIBES,
Plaintiff-Appellant,

v.

BOYD WALTON, JR., *et ux, et al.,*
Defendants-Appellees,

and

STATE OF WASHINGTON,
Defendant-Intervenor/Appellee.

[Filed October 3, 1984]

ORDER

Before: WALLACE, SCHROEDER and FLETCHER, *Circuit Judges*

The State of Washington intervened in this action on the basis of its asserted authority to grant water permits concerning the No Name system, a water source contained entirely within the boundaries of the Colville Reservation. In *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981),

this court, based primarily on the geographic facts of the case, conclusively determined that the State's regulation of water rights in the No Name system had been preempted by the creation of the Colville Reservation. *Id.* at 52.

On appeal after remand, appellants challenge the State's status as a party to this appeal. On July 10, 1984 this court ordered the State to identify its interest in this appeal and to show cause why it should not be dismissed as a party. Having reviewed the State's response, the court concludes that the interests identified are insufficient to support the State's continued status as a party to this appeal and thus dismisses the State.

Although dismissed as a party, the State is granted leave for the late filing of a brief as an amicus curiae within 21 days of entry of this order. Appellants may file a separate reply brief, if necessary, within 14 days of service of the State's brief.